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BOOK REVIEW

THE AMBIGUITY OF NEUTRALITY

Steven K. Green†

THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES. By Charles L. Glenn.†† Princeton: Princeton University Press, 2000. Pp. 304. \$35.00.

Charles Glenn's The Ambiguous Embrace: Government and Faith-Based Schools and Social Agencies explores the debate over vouchers and government-financed social services administered by religious organizations, otherwise known as "charitable choice," from the perspective of faith-based organizations. In this Review, while Professor Steven K. Green compliments the book for effectively illustrating how faith-based organizations can be compromised and corrupted by participating in government-funded programs, he explains that the book suffers because it fails to address the logical implications of its arguments. Additionally, Professor Green argues that the Constitution does not support the book's advocacy of greater government encouragement of faith-based organizations to provide education and social services.

INTRODUCTION

For decades, legal scholars have debated whether constitutional principles of neutrality toward religion or nonadvancement of the same either require or prohibit government vouchers for private, religious education.¹ Relying on language that first appeared in a foot-

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¹ See Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5 (1987); Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645 (1992); Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development* (pt. 2), 81 HARV. L. REV. 513 (1968); Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37 (1993); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817 (1984); Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375 (1999); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991); Michael A. Paulson, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986).

note in a 1973 Supreme Court opinion,² some commentators have urged a constitutional construct that treats religious entities no differently than their secular counterparts when it comes to the receipt of government funds, benefits, and contracts. As these scholars have contended, so long as the government structures a program in a manner that neither favors nor disfavors recipients on the basis of religion and extends any benefits on an evenhanded basis, the Establishment Clause is not offended when some of the funds end up in the possession of religious entities or pay for religiously oriented activity.³ This constitutional schema, bolstered by a series of Court decisions touting neutrality as a "hallmark" of the religion clauses,⁴ has emerged as the legal rationale for vouchers and was most apparent in the Wisconsin Supreme Court's 1998 decision upholding the constitutionality of the Milwaukee Parental Choice Program.⁵ Over the last several years, this neutrality theory has found a second application with the issue of government-financed social services administered by religious organizations, otherwise known as "charitable choice." A linchpin of the Welfare Reform Act of 1996 which encourages privatization of welfare services, charitable choice authorizes religiously oriented social ser-

² See *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 782-83 n.38 (1973) (suggesting the constitutionality of benefits programs "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted").

³ See STEPHEN V. MONSMA, *POSITIVE NEUTRALITY: LETTING RELIGIOUS FREEDOM RING* 238-41 (1993); Mark E. Chopko, *Vouchers Can Be Constitutional*, 31 CONN. L. REV. 945 (1999).

⁴ See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."); see also *Mitchell v. Helms*, 120 S. Ct. 2530, 2541 (2000) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."); *Agostini v. Felton*, 521 U.S. 203, 231 (1997) (requiring neutral and evenhanded benefit distribution for aid programs to survive First Amendment scrutiny); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995) ("It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups."); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487-88 (1986) (upholding vocational assistance program "made generally available without regard to the sectarian—nonsectarian, or public—nonpublic nature of the institution benefitted" (citing *Comm. for Pub. Educ. and Religious Liberty*, 413 U.S. at 782-83)); *Mueller v. Allen*, 463 U.S. 388, 397 (1983) (finding a tax deduction for education expenses constitutional because it applied to sectarian as well as nonsectarian education expenses).

⁵ See *Jackson v. Benson*, 578 N.W.2d 602, 617 (Wis. 1998) (holding that the voucher program provides aid to sectarian and nonsectarian private schools on the basis of "neutral, secular criteria that neither favor nor disfavor religion" (quoting *Agostini*, 521 U.S. at 231)); see also *Recent Case*, *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), cert. denied, 67 U.S.L.W. 3170 (U.S. Nov. 9, 1998) (No. 98-376), 112 Harv. L. Rev. 737 (1999) (analyzing *Jackson v. Benson*).

vice agencies—including those that integrate religious doctrine into their programs—to receive government contracts, grants, and vouchers to provide various types of social services.⁶

While neutrality serves as the theoretical framework underlying vouchers and charitable choice, the similarities between the two schemes do not end there. Both involve the privatization of important human services, the first being the education of our children and the second concerning the care and rehabilitation of the poor and dispossessed. Our nation's moral and financial commitment to education and social services is rivaled only by that to national defense and the Social Security system; any movement toward privatization of such important structures understandably elicits claims that the government is abdicating its responsibility for the education and care of its citizenry.⁷ As if privatization was not sufficiently controversial on its own, vouchers and charitable choice utilize religious or "faith-based" organizations to provide the funded educational and social services.

It cannot be gainsaid that the *raison d'être* for vouchers and charitable choice is to involve religious organizations in government funded human service programs.⁸ Many such organizations are "pervasively sectarian" in character, being either parochial schools or church agencies, with that term describing an institution where a religious mission permeates the operation such that the religious and secular functions are inseparable.⁹ Other factors that tie the two schemes include a long-standing tradition of religious involvement in education and charity work and the fact that many religious groups view such services as integral to their religious ministries. As a result, the legal and policy issues surrounding vouchers and charitable choice are closely intertwined.¹⁰ At the center of the debate over

⁶ Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), 42 U.S.C. § 604a (Supp. III 1997 & Supp. IV 1998).

⁷ See STEVEN RATHGEB SMITH & MICHAEL LIPSKY, *NONPROFITS FOR HIRE: THE WELFARE STATE IN THE AGE OF CONTRACTING* 188-215 (1993).

⁸ See 42 U.S.C. § 604a(b) ("The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in [this section] . . .").

⁹ See *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988) (describing a pervasively sectarian organization as "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission. . . ." (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973))). Some commentators have criticized the term "pervasively sectarian" for being pejorative and no longer an accurate representation of many faith-based operations. See Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term "Sectarian"*, 6 J.L. & POL. 449 (1990); Chopko, *supra* note 1, at 658. However, I shall use the term in this Review because it represents a term of art in Court jurisprudential parlance.

¹⁰ See Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 DUKE L.J. 493 (1999).

both schemes is the notion of neutrality and its position in the hierarchy of First Amendment values.

Entering the fray is Charles Glenn's timely book, *The Ambiguous Embrace: Government and Faith-Based Schools and Social Agencies* ("Ambiguous Embrace"), which addresses both vouchers and charitable choice from the perspective of faith-based organizations.¹¹ Although not particularly original,¹² *Ambiguous Embrace* argues forcefully for the indispensable role of faith-based organizations in providing human services and generating a sense of moral obligation essential for liberal democracies. A constant theme in Glenn's book is that government programs should be neutral toward religious entities—whether they be churches, social service agencies, or parochial schools. Glenn insists that to exclude faith-based organizations from participating in such important socializing structures not only amounts to discrimination but is done so to the peril of society.¹³

Despite its strong plea for vouchers and charitable choice, the primary focus of *Ambiguous Embrace* is not the constitutional or policy arguments favoring either scheme, but on how such funding programs affect the integrity and vitality of faith-based organizations. The book's greatest contribution to the debate is its exploration into the various ways that participating in government-funded programs can compromise and corrupt faith-based organizations.¹⁴ To his credit, Glenn does not join the chorus of those who view government bureau-

¹¹ CHARLES L. GLENN, *THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES* (2000). Glenn, an education professor at Boston University, is a member of a cadre of leading scholars and policy analysts advocating vouchers and charitable choice.

¹² Many of the same arguments are contained in JOE LOCONTE, *SEDUCING THE SAMARITAN: HOW GOVERNMENT CONTRACTS ARE RESHAPING SOCIAL SERVICES* (1997), and STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY* (1996), sources on which Glenn relies.

¹³ The term "faith-based" may encompass a broad range of religiously affiliated agencies and institutions, including such well-known organizations as Catholic Charities and the Salvation Army, which have long participated in funding programs by offering essentially secular services, albeit from a religious perspective or motivation. See GLENN, *supra* note 11, at 37. Although Glenn would include such religiously affiliated groups in his definition, in most instances he uses the term more narrowly to indicate groups that would be considered pervasively sectarian in organization and operation. Examples would be a traditional Catholic parochial school, a fundamentalist Christian academy, or a program such as Teen Challenge, which defines itself as a Christian ministry that exists to "evangelize and discipline" youth with drug dependencies. See *id.* at 46-49, 70.

¹⁴ See *id.* at 9. According to Glenn,

"[T]here is a real danger that such structures might be 'co-opted' by the government in a too eager embrace that would destroy the very distinctiveness of their function." Government support of choice among educational and social programs could come with so many strings attached that they would no longer offer real alternatives, function as mediating structures, or promote a coherent sense of moral obligation.

Id. (quoting PETER L. BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* 163 (Michael Novak ed., 2d ed. 1996)).

cracy and regulation as the primary threats to faith-based organizations. Though regulation represents a real danger for Glenn—especially through the enforcement of antidiscrimination laws on employment decisions—the main threat to faith-based organizations participating in government programs comes from a loss of a sense of mission, due to a growing dependence on funding and pressure to professionalize staffs.¹⁵ Refreshingly, Glenn also avoids justifying vouchers and charitable choice through inflated success rates or based on market theories. Rather, Glenn argues that the unique and indispensable contribution of faith-based organizations in the realm of human services warrants vouchers and charitable choice.¹⁶ Thus, while Glenn champions religious participation in government educational and social service programs, he does so with a degree of ambivalence.

This Review considers the four primary themes of *Ambiguous Embrace* that are of greatest interest to lawyers.¹⁷ Part I, serving as a precursor to the central theme of neutrality, considers Glenn's argument that a sense of "moral obligation" is essential for both education and social services and that only private "mediating structures" such as faith-based organizations are equipped to instill these necessary values. Related to this theme is the issue of how the nation's founders viewed the role of religious and charitable organizations in our constitutional order, not merely in the provision of human services, but also as custodians of the moral and civic virtues essential to the success of the Republic. Part II then discusses Glenn's view of government neutrality toward religion and how that perspective fits within the larger debate over the funding of faith-based schools and social service agencies. The Supreme Court's fractured holding in *Mitchell v. Helms*¹⁸ last term, offering conflicting conceptions of neutrality and its role in religion clause jurisprudence,¹⁹ has only exasperated this debate. Following the discussion of neutrality theory, Part III briefly explores Glenn's arguments for vouchers and charitable choice. The final part

¹⁵ See *id.* at 43, 165.

¹⁶ See *id.* at 30, 112, 269-70.

¹⁷ Despite its polemical tone, the book contains much that may be of interest to social scientists working in related fields. In several sections, Glenn compares American educational and social service practices with those in western European countries, with the latter providing examples of closer cooperation between governments and faith-based institutions in schooling and social services than exists in America. See *id.* at 110-11, 120-22, 131-64. *Ambiguous Embrace* also contains two vignette chapters, one discussing "Teen Challenge," an intensive Christian-based substance abuse program that has yet to receive public funding, and the other considering the "success" of the Salvation Army, an organization that has managed to maintain its identity as a church while operating one of the largest publicly funded social service programs in the nation. See *id.* at 62-73, 212-40.

¹⁸ 120 S. Ct. 2530 (2000).

¹⁹ See *infra* note 89 and accompanying text.

examines one aspect of the "ambiguous" relationships between faith-based organizations and the government: whether religious providers should be held accountable to laws prohibiting employment discrimination. For Glenn and most advocates of charitable choice, the enforcement of antidiscrimination laws represents the greatest regulatory threat to the religious integrity and mission of faith-based organizations. Glenn's argument for exempting faith-based organizations from the coverage of such laws for publicly funded positions also implicates notions of neutrality and is the focus of Part IV.

I

THE APPROPRIATE ROLE OF THE GOVERNMENT IN EDUCATION AND SOCIAL SERVICES

Controversy over the government's proper role in providing educational and social services is not new. Long before John Dewey redefined American public education with his pragmatic secularism, professional educators such as Horace Mann, Henry Barnard, and William Torrey Harris had secured the dominant role of the state in the education of the nation's youth.²⁰ The unifying element in their various approaches to education, in addition to an emphasis on professionalism and government centralization and control, was a de-emphasis of a spiritual aspect to public education.²¹ This secular model for education, one with the government firmly in control, is generally accepted today, though it has continued to be controversial for some education and religious groups. The government "take-over" of social services would transpire later, and the effects and accompanying criticisms would be similar: an expanding government bureaucracy that exercises increasing control of services through funding, standards, and regulation and that marginalizes religious and moral alternatives.

This portrayal sets the stage for Glenn's opening theme about the appropriate role of government in providing human services. Glenn's argument is simple, although its implications are more subtle. Only "mediating structures"—the value-generating and value-maintaining agencies that mediate between individuals and the state—are capable of communicating the values and sense of moral obligation necessary for civil society.²² Traditionally, mediating structures such as churches, parochial schools, and eleemosynary organizations educated children and ministered to human needs in ways that acknowledged and encouraged the spiritual components of personal and

²⁰ PAUL MATTINGLY, *THE CLASSLESS PROFESSION: AMERICAN SCHOOLMEN IN THE NINETEENTH CENTURY* 63-72, 81 (1975); NEIL GERARD MCCLUSKEY, *PUBLIC SCHOOLS AND MORAL EDUCATION* 145-73 (1958).

²¹ MATTINGLY, *supra* note 20, at 63-72, 81; MCCLUSKEY, *supra* note 20, at 145-73.

²² See GLENN, *supra* note 11, at 3 (citing BERGER & NEUHAUS, *supra* note 14, at 164).

social life.²³ However, with the advent of the welfare state and state bureaucracies, the government assumed greater responsibility for providing education and social services.²⁴ Not only did the government's take-over of social services displace the role of private mediating institutions, but it also substituted the normative approach to human services with one of secular relativism.²⁵ In turn, this development has created a hostile climate in which religion "has been chased vigorously out of public schools and out of publicly funded nonprofit institutions, leaving what [has popularly been called] a 'naked public square.'"²⁶

For Glenn, the tragedy in this development lies not only in the exclusion of private mediating institutions from the public square, but also in the loss of a sense of moral agency and obligation that is indispensable for the operation of civil society. Not only is government ill equipped to instill normative values, but its emphasis on professionalization and standardization weakens the very institutions capable of generating and perpetuating that necessary sense of moral obligation.²⁷ Glenn's solution is for the government to recognize its limitations and utilize private mediating institutions that can instill values while ministering to human needs.²⁸ Respect for the value-forming role of mediating institutions and a pluralistic social order demands that the state ensure that such institutions participate in human service programs. According to Glenn, "government should entrust the care and education of children and adults to the greatest extent possible to civil society institutions that reflect the diverse nature of the society."²⁹

Glenn's description of the post-New Deal approach to human services, while accurate in some respects, stretches the facts to fit within his characterization of the system's shortcomings. Although private schooling preceded public schooling in this country, public responsibility for education dates back to colonial America.³⁰ Albeit often in

²³ See *id.* at 7-8.

²⁴ See *id.* at 165-66.

²⁵ See *id.* at 13-23, 165-66. "[T]he state is in effect absorbing into itself the traditional value-shaping mission of churches and other institutions of the civil society and is tempted to do so in a fashion that drives those competitors in value-formation from the field." *Id.* at 18.

²⁶ *Id.* at 7. Richard John Neuhaus coined the term "naked public square." See RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA*, at vii (1984). For this argument, Glenn relies heavily on works by Neuhaus, Peter Berger, Marvin Olasky, and Stephen V. Monsma. See BERGER & NEUHAUS, *supra* note 14; MONSMA, *supra* note 12; MARVIN OLASKY, *RENEWING AMERICAN COMPASSION* (1996); MARVIN OLASKY, *THE TRAGEDY OF AMERICAN COMPASSION* (1992).

²⁷ See GLENN, *supra* note 11, at 6-7, 13-27.

²⁸ See *id.* at 21-23.

²⁹ *Id.* at 269.

³⁰ 2 ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* 47-52 (1950).

partnership with local churches, several New England towns established public schools during the seventeenth century, while Benjamin Franklin helped establish the first public academy in Philadelphia in 1753.³¹ The general sentiment following the American Revolution was that the education of children was vital to the Republic's stability and success, and the responsibility for ensuring an educated citizenry rested with the government.³²

In 1779, Thomas Jefferson proposed a plan for establishing public schools in Virginia with the belief that if "every individual which composes the[] mass [of society] participates of the ultimate authority, the government will be safe."³³ An additional sentiment was that public education in the new nation should be nonsectarian in order to avoid the European experience of religious conflict and dissension. Early educators believed that they could create a new synthesis of public virtue, one that would unite diverse social and religious groups into a common civic faith to which people could swear their loyalty.³⁴

This commitment to a *public* role in education became apparent in the early nineteenth century with the creation of common schools in Massachusetts, New York, and Philadelphia—a movement that preceded the rise of parochial schooling in the 1830s and 1840s.³⁵ Public schools also sought to instill values. However, educators like Horace Mann, whose nonsectarian schools Catholics criticized as favoring

³¹ *Id.*

³² Timothy L. Smith, *Protestant Schooling and American Nationality, 1800-1850*, 53 *J. Am. Hist.* 679, 679 (1966).

³³ MARTIN A. LARSON, *THE ESSENCE OF JEFFERSON* 152 (1981). Education reformer Noah Webster wrote in 1790 that "[i]n our American republics, where government is in the hands of the people, knowledge should be universally diffused by means of public schools. . . . An acquaintance with ethics and with the general principles of law, commerce, money, and government is necessary for the yeomanry of a republican state." Noah Webster, *On the Education of Youth in America* (1790), reprinted in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* 43, 66 (Frederick Rudolph ed., 1965).

³⁴ See Samuel Knox, *An Essay on the Best System of Liberal Education*, reprinted in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC*, *supra* note 33, at 271, 332 (remarking that "however important [religious instruction] may be, yet, on account of preserving that liberty of conscience in religious matters which various denominations of Christians in these states justly claim, due regard ought to be paid to this in a course of public instruction"); Smith, *supra* note 32, at 680-81 (noting that "[b]y their establishment and control of both, public and private schools, churchmen stamped upon neighborhoods, states, and nation an interdenominational Protestant ideology which nurtured dreams of personal and social progress"); Webster, *supra* note 33, at 50-51 (counseling against religious instruction and catechism and for limiting the use of the Bible to passages related to history and morality).

³⁵ See 2 STOKES, *supra* note 30, at 50-67; Smith, *supra* note 32, at 681-85. Although there were a handful of Catholic parochial schools in America in the early 1800s, significant numbers did not exist until after the Baltimore Provincial Councils of 1829 and 1833, which first sanctioned their establishment and set up the framework for school development. See PETER GUILDAY, *THE NATIONAL PASTORALS OF THE AMERICAN HIERARCHY* 27-30, 78 (1923); ANSON PHELPS STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 227-29 (rev. ed. 1964).

Protestantism and Evangelicals criticized as being too secular, quickly realized the difficulty in identifying an acceptable approach to instilling values.³⁶ Although the common school movement had many shortcomings, as Glenn highlights in other works,³⁷ those limitations should not overshadow the long-standing sense of public responsibility for education that exists in this country.

Similarly, a public role in providing for the needy dates back several hundred years.³⁸ During the late eighteenth and early nineteenth centuries, many northeastern cities established alms houses, public dispensaries (hospitals), and relief programs to address the growing poverty caused by urbanization and immigration.³⁹ Churches and religious reform organizations also increased their efforts in ministering to the poor.⁴⁰ Not until the mid-nineteenth century, however, did most religious charities move out of the realm of alms giving and begin to develop more comprehensive responses to poverty.⁴¹

Claims that the government displaced the role of religious charitable organizations with the advent of New Deal and Great Society programs are therefore overstated.⁴² Even Glenn acknowledges that the vast majority of private social organizations have emerged since the 1970s, primarily in response to the expansion of government funding.⁴³ Glenn, however, is wrong to argue that the government has acted with hostility toward religious social service organizations. For years, the government has provided religious organizations such as the Salvation Army, Catholic Charities, Lutheran Social Services, and the Council of Jewish Federations with hundreds of millions of dollars for programs providing housing, job training, foster care, substance abuse counseling, and foodstuffs.⁴⁴ For example, in 1995, the

³⁶ See ELLWOOD P. CUBBERLEY, READINGS IN PUBLIC EDUCATION IN THE UNITED STATES 204-10 (1934); 2 STOKES, *supra* note 30, at 54-58.

³⁷ See CHARLES LESLIE GLENN, JR., THE MYTH OF THE COMMON SCHOOL (1988).

³⁸ Boston opened its first public almshouse in 1664. See DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 39 (1971); RONALD G. WALTERS, AMERICAN REFORMERS, 1815-1860, at 173 (1978).

³⁹ ROTHMAN, *supra* note 38, at 30-45; WALTERS, *supra* note 38, at 173-74.

⁴⁰ WALTERS, *supra* note 38, at 175-79.

⁴¹ See ROTHMAN, *supra* note 38, at 155-205; WALTERS, *supra* note 38, at 177-79. The nineteenth century religious reform movement initially focused on evangelism and behavioral reform, with an added emphasis on charitable work in the mid-century. See TIMOTHY L. SMITH, REVIVALISM AND SOCIAL REFORM 34-44, 163-77 (1957).

⁴² See LOCONTE, *supra* note 12, at 1-2; OLASKY, THE TRAGEDY OF AMERICAN COMPASSION, *supra* note 26, at 151-83.

⁴³ See GLENN, *supra* note 11, at 10, 28; see also SMITH & LIPSKY, *supra* note 7, at 76-77 ("Starting in the 1960s, many nonprofit agencies were founded in direct response to government funding.").

⁴⁴ JOHN MCCARTHY & JIM CASTELLI, THE ASPEN INSTITUTE NONPROFIT SECTOR RESEARCH FUND, RELIGION-SPONSORED SOCIAL SERVICE PROVIDERS: THE NOT-SO-INDEPENDENT SECTOR 23-31, 48-50 (1997); see also Stephen V. Monsma, *The "Pervasively Sectarian" Standard in Theory and Practice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 322 (1999) (docu-

year before charitable choice legislation was first enacted, Catholic Charities USA received \$1.2 billion from federal, state, and local government sources—an amount comprising sixty-two percent of the organization's budget.⁴⁵ While it is true, as Glenn suggests, that some faith-based agencies have either modified their programs to receive public funding or been excluded from participating in government programs because of prohibitions on funding pervasively sectarian institutions, many more religious organizations have participated comfortably in the system by offering secular services while retaining their identity or sense of mission.⁴⁶

History and practice aside, Glenn's critique raises important questions about the state's appropriate role in providing human services, and more fundamentally, in instilling normative values among its citizenry. As Glenn asks, "to what extent should government concern itself with changing the way people are, with how they think and what they value?"⁴⁷ This centuries old question lies at the heart of the over two-hundred-year-old church-state debate. Unquestionably the Founders believed that civic virtue and moral responsibility were indispensable human qualities for the nation's survival.⁴⁸ The Founders also acknowledged the important role of religious institutions in civil society and assumed that these institutions would be the primary transmitters of religious and moral values.⁴⁹ The debate turns on whether the Founders provided for the maintenance of such normative values within the constitutional structure. Only a theocrat would argue that the state itself should assume the role of church council or priest. Glenn's insistence that the government should not seek to instill

menting a "lively, continuing partnership between government and nonprofit service organizations, including faith-based ones").

⁴⁵ CATHOLIC CHARITIES U.S.A., *A VISION FOR FAMILIES AND COMMUNITIES: 1996 ANNUAL REPORT* 22 (1997); accord LOCONTE, *supra* note 12, at 44 (documenting that Catholic Charities of Boston received sixty-two percent of its twenty-eight million dollar budget from federal and state sources, making it the largest private social service agency in Massachusetts).

⁴⁶ A persistent theme in *Ambiguous Embrace* is that religious organizations cannot be true to their mission by offering secular programs that do not integrate religious doctrine. See GLENN, *supra* note 11, at 245. Espoused by many charitable choice proponents, this argument insults the thousands of religiously affiliated agencies that view secular-oriented services as compatible with their religious mission. See Fred Kammer, *10 Ways Catholic Charities Are Catholic*, available at <http://www.catholiccharitiesusa.org/beliefs/10ways2.html> (last visited Sept. 11, 2000). Glenn mildly criticizes the Salvation Army for modifying its programs over the years to qualify for public funding. See GLENN, *supra* note 11, at 217, 220-34. However, he offers little evidence to show that its religious mission has suffered or that its programs have become less effective as a result of those modifications. See *id.*

⁴⁷ GLENN, *supra* note 11, at 14.

⁴⁸ See John Adams, *Thoughts on Government* (1776), in 1 *AMERICAN POLITICAL WRITINGS DURING THE FOUNDING ERA 1760-1805*, at 401, 401-09 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

⁴⁹ See Samuel Kendal, *Religion the Only Sure Basis of Free Government* (1804), in 2 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805*, at 1241, 1241-63 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

moral values is likely to resonate with both liberals and conservatives.⁵⁰ But this consensus hides the deep divisions about whether the state should go beyond assuming the existence of private mediating institutions to enhancing their value-shaping role in society. Glenn, of course, argues that the state should actively encourage faith-based approaches to human services through funding and removal of disabling regulations.⁵¹ Merely because the government itself cannot instill values does not mean it should not seek out faith-based partners to fill the gap.⁵²

This approach contrasts with the more traditional liberal position of religious agnosticism in which the state neither encourages nor discourages religious fealty. The state may validate religious institutions, but only for their secular contribution to society.⁵³ As reflected in the Court's separationist holdings reflecting a relationship of "benevolent neutrality,"⁵⁴ churches and religious organizations are left alone to determine their own beliefs and governance,⁵⁵ are accommodated in their practices,⁵⁶ and are exempted from taxation and minor regula-

⁵⁰ Glenn further denies that government institutions, such as public schools, can identify and transmit commonly shared values that transcend the secular-religious gulf and promote a common civic virtue. Interestingly, Glenn's argument that government is unable to instill normative values parallels those made by liberal theorists such as John Rawls and Ronald Dworkin who insist that in a liberal democracy government should abstain from expressing its own views on normative questions, especially on matters that lack a consensus of opinion, at the risk of stifling pluralism and alternative viewpoints. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 181-204 (1985); JOHN RAWLS, *A THEORY OF JUSTICE* 186-94 (rev. ed. 1999).

⁵¹ See GLENN, *supra* note 11, at 267-69.

⁵² See *id.* As discussed in the following section, Glenn's position that government should actively encourage faith-based approaches fails a central tenet of neutrality. See *infra* Part II.

⁵³ *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 673 (1970) ("The state has an affirmative policy that considers these groups [churches and other nonprofit quasi-public corporations] beneficial and stabilizing influences in community life and finds [tax exempt status] useful, desirable, and in the public interest."). See in particular the exchange between Justices Brennan and Scalia in *Texas Monthly, Inc. v. Bullock*, over the rationale underlying religious accommodations and whether government can value religion qua religion. 489 U.S. 1, 10-17 (1989) (Brennan, J.) (arguing for the unconstitutionality of benefits limited exclusively to religious organizations); *id.* at 33-41 (Scalia, J., dissenting) (pointing out that accommodation of religion as required by the First Amendment requires the state to provide benefits exclusively to religions). But see *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.").

⁵⁴ *Walz*, 397 U.S. at 669, 676.

⁵⁵ See *Jones v. Wolf*, 443 U.S. 595, 609 (1979) (deferring to the church's own definition of its "true congregation" for the purpose of a dispute over ownership of church property); *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevic*, 426 U.S. 696, 720-21 (1976) (refusing to overturn the church's reorganization of its diocese, on the grounds that it was a matter of "internal church government").

⁵⁶ See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-40 (1987) (upholding the provision of Title VII that exempts

tion⁵⁷ but otherwise excluded from enjoying the benefits of extensive government sponsorship. Most importantly, the government is disabled from opining on the merits of any religious perspective.⁵⁸ This division represents a fundamental conflict over the way in which the state can acknowledge and use religious entities to assist in furthering the commonweal.

The main issue for Glenn, however, is not merely the extent of government sponsorship of religious programs, but who is responsible for those programs in the first instance. Government has "overstep[ped] the limits of its appropriate role" in providing education and social services because its activities are never value-free.⁵⁹ Government should "turn to nonprofit organizations to provide services 'in areas where direct government control is held to be undesirable' . . . because they involve the formation of opinions and values, especially if there are deep divisions in the society over what worldview should be promoted."⁶⁰

This argument puts public schools, in particular, in an untenable position: they are unqualified to teach the values we agree are necessary in a civil society, but then are criticized for not addressing the myriad emotional needs of children in normative ways.⁶¹ The only solution is for the state to remove itself from the business of education (and social services) and limit itself to collecting and distributing tax revenues. Wherever else this argument leads, it does not support a market-based school voucher system which always assumes that some

religious organizations from the prohibition against discrimination in employment on the basis of religion); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501-07 (1979) (refusing to construe the National Labor Relations Act as conferring NLRB jurisdiction over schools operated by a church to teach both religious and secular subjects).

⁵⁷ See *Walz*, 397 U.S. at 676 ("All of the 50 states provide for tax exemption of places of worship . . ."). But see *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 397 (1990) (upholding California's imposition of sales and use tax liability on a church's sale of religious material); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303-06 (1985) (subjecting nonprofit religious organizations to the recordkeeping provisions of the Fair Labor Standards Act).

⁵⁸ See *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) ("[T]he prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*'" (alteration and emphasis in original)). For the government to expressly seek out faith-based organizations for their value-shaping role raises church-state endorsement concerns.

⁵⁹ GLENN, *supra* note 11, at 17 ("Put another way, popular schooling is the instrument that an activist government is most tempted to employ to bring about social transformation and that, having started to use, it is most likely to use ever more deliberately and extensively.").

⁶⁰ *Id.* at 21 (quoting Christopher Hood et al., *National Government-Level Services in Six Countries*, in *DELIVERING PUBLIC SERVICES IN WESTERN EUROPE: SHARING WESTERN EUROPE EXPERIENCE OF PARA-GOVERNMENT ORGANIZATION* 59, 61 (Christopher Hood & Gunnar Folke Schuppert eds., 1988)).

⁶¹ See *id.* at 20-21.

parents will choose secular public education for their children and that public schools will improve through increased competition. Rather, this libertarian argument leads to the privatization of education and most social services. Under this schema, the only appropriate alternatives are private religious schools and faith-based social service programs.⁶²

Glenn is hesitant to acknowledge where his privatization argument leads, primarily because he sees a continuing role for government in these areas. "There are good reasons," Glenn argues, "for government to continue an active role—perhaps even more active, in some respects, than at present—in ensuring that educational and social services are adequate and accessible, even as it turns to civil society institutions to deliver those services."⁶³ Glenn envisions a cooperative relationship between government and the private sector with the state retaining important responsibilities for ensuring that services are fairly and equitably distributed.⁶⁴ But at its core, Glenn advocates a model in which the government abstains from providing those services itself, with its responsibilities limited to facilitating and funding the operations of private mediating institutions. This would represent a fundamental shift in the way educational and social services are provided in this country, a change that *Ambiguous Embrace* only indirectly acknowledges. Glenn's unwillingness to directly address this issue is a major weakness of the book.

II

THE NATURE OF GOVERNMENT NEUTRALITY TOWARD RELIGION

The foregoing discussion about the role of faith-based organizations in providing educational and social services sets the stage for the book's central legal theme of government neutrality toward religion. According to Glenn, for too long, government entities have structured their programs in ways that discriminate against religious organizations, requiring them to de-emphasize if not sanitize those religious aspects that distinguish religious organizations and make them effective.⁶⁵ These practices derive from Court holdings prohibiting the funding of pervasively sectarian organizations or programs with relig-

⁶² See *id.* at 247-51, 262-64 (criticizing religious agencies that have a spiritual approach but are not distinctly religious).

⁶³ *Id.* at 22.

⁶⁴ *Id.* at 23 ("Government's role in generating revenues equitably from the entire society, protecting the interests of the poor and vulnerable in the name of justice, promoting common standards (carefully!), and stimulating activity where it has not arisen spontaneously is entirely consistent with a vigorous civil society.").

⁶⁵ See *id.* at 74-98.

ious content.⁶⁶ This “strict separationist” position has grown out of a distrust of faith-based perspectives and a bias toward a secularist ideology that, according to Glenn, “seeks to make converts” of its own.⁶⁷ “But [the] exclusion of religious speech and motivations, of religious organizations and programs from equal participation in the ‘public square’ and in public funding is not neutral in its effects.”⁶⁸ In place of the strict separationist model or its rival “strict neutrality”—which mechanically treats religion no better or worse than nonreligion—Glenn advocates a framework that he terms “positive neutrality,” which entitles religious organizations to participate equally with their nonreligious counterparts in government programs and benefits while accommodating the unique attributes of the religious entities.⁶⁹ Rather than being agnostic to the special contribution of religious organizations and treating them no differently than their secular counterparts, positive neutrality “takes the position that government should under some circumstances give its support to religious activities and motivations, when they serve a purpose whose benefits are primarily social rather than religious in nature.”⁷⁰ For Glenn, it is “not enough that faith-based organizations be eligible for funding unless they are also protected from interference with how they approach the work for which they are funded.”⁷¹

Positive neutrality, therefore, “rests upon a pluralistic understanding of the political and social order that recognizes the important role of faith communities and associations alongside other forms of voluntary organization in maintaining society and in transmitting the habits and values that sustain it.”⁷² In a sense, religion serves as a counterweight to the secularly-based government programs. Positive neutrality would not prohibit faith-based schools and agencies from using public funds for religiously infused programs, provided government receives its secular value for the services rendered.⁷³

Glenn seems unsure, however, whether positive neutrality simply removes barriers to funding religious organizations—while lifting bur-

⁶⁶ *Id.* at 83.

⁶⁷ *Id.* at 76. “The myth that secularism is a neutral position between belief and unbelief is widely accepted, despite its inherent absurdity.” *Id.* at 20.

⁶⁸ *Id.* at 76.

⁶⁹ Glenn’s critique of the separationist perspective and his understanding of “positive neutrality” borrows heavily from the works of Stephen V. Monsma and Carl H. Esbeck. See MONSMA, *supra* note 3, at 188-209; Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997).

⁷⁰ GLENN, *supra* note 11, at 77.

⁷¹ *Id.* at 101.

⁷² *Id.* at 78.

⁷³ See *id.* at 77, 97-98; MONSMA, *supra* note 3, at 192; see also Esbeck, *supra* note 69, at 17 n.68 (discussing Justice Kennedy’s opinion in *Bowen v. Kendrick*, 487 U.S. 589 (1988), espousing this view).

dening regulations—or goes further to require the government to seek out religious solutions and alternatives for education and social services. The former model mandates equal treatment of religious entities—albeit in a modified form—while the latter results in government encouragement of religious solutions. Glenn advances both models,⁷⁴ although he seems oblivious to the inconsistencies between the two. Yet despite occasional references to equal treatment,⁷⁵ Glenn prefers the latter model.⁷⁶ Because government secularity itself is nonneutral, positive neutrality would require government to fashion many of its own programs in ways that facilitate a religious perspective.⁷⁷ To use Glenn's own example of public charter schools, once the state has decided to offer a variety of curricula and approaches in public education, it could not prevent the formation of a charter school with a "biblical basis."⁷⁸ Under positive neutrality, therefore, the government should seek out religious solutions for education and social services due to religion's unique ability to transmit values and instill a sense of moral obligation.

Glenn's formulation of neutrality evinces a misunderstanding of the Court's religion clause and free speech holdings and of the inherent authority of the government to structure its programs in ways that validate particular perspectives.⁷⁹ To a degree, he can be forgiven for his misunderstanding, for few legal concepts are more ambiguous. Neutrality is "a coat of many colors," the second Justice Harlan once remarked, and the concept is open to many interpretations.⁸⁰ The Court first spoke of neutrality in *Everson v. Board of Education*, the 1947 parochial school bussing case, considered by many to be the archetypal separationist opinion.⁸¹ Since then, the high court identified

⁷⁴ GLENN, *supra* note 11, at 100-04.

⁷⁵ *See id.* at 98, 270.

⁷⁶ *See id.* at 100, 104.

⁷⁷ *See id.* at 127-28.

⁷⁸ *Id.* Glenn also criticizes the Court's holdings regarding religious expression in schools as lacking neutrality toward religion. *Id.* at 75-76. In so criticizing, Glenn fails to distinguish between government sponsored settings and open fora that lend themselves to a variety of perspectives. *See* discussion *infra* notes 110-25. Glenn also seeks to highlight inconsistencies between holdings prohibiting financial aid to parochial schools but permitting similar aid to church-related colleges and religiously affiliated social service agencies. *See id.* at 79-90. Nonetheless, Glenn acknowledges that "most religious nonprofits receiving public money are not pervasively sectarian" as are parochial schools. *Id.* at 88.

⁷⁹ *See* *Rust v. Sullivan*, 500 U.S. 173, 193-95 (1991); *infra* notes 110-25.

⁸⁰ *Bd. of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring).

⁸¹ 330 U.S. 1, 16 (1947) (declaring that the government could not exclude "the members of any . . . faith, because of their faith or lack of it, from receiving the benefits of public welfare legislation" (emphasis omitted)). Justice Black, the author of *Everson*, would later dissent from the Court's 1968 decision upholding the provision of secular textbooks to public and parochial schools, arguing that neutrality had its limits, especially where it resulted in state finances "actively and directly assist[ing] the teaching and propagation of sectarian religious viewpoints."). *Allen*, 392 U.S. at 253 (Black, J., dissenting).

neutrality as a goal in rulings as seemingly inconsistent as upholding tax exemptions for churches⁸² and prohibiting tax credits for tuition at parochial schools.⁸³ Maintaining "neutrality" has also been the rationale for prohibiting school-sponsored prayer and Bible readings,⁸⁴ but permitting student religious clubs on secondary school campuses.⁸⁵ Clearly, when the Court affirmed neutrality in these various contexts it could not have been speaking about the same concept. Consider, for example, the divergent opinions of Justices Brennan and Scalia in *Texas Monthly, Inc. v. Bullock*.⁸⁶ Both assigned neutrality as the touchstone principle for striking and permitting, respectively, a tax exemption limited to religious magazines and publications.⁸⁷ The Court has used the term to represent quite distinct concepts—as a median between being pro- and antireligious, as a synonym for "secular," and as a form of evenhanded treatment—but most often in a conclusory manner.⁸⁸ One need only peruse the multiple opinions in *Mitchell v. Helms*, each offering divergent views of neutrality, to appreciate the confusion and division that exists over this concept.⁸⁹ The scholarly literature on the subject has been equally diverse. Some assert that neutrality is the complement to nonadvancement while others claim it is its antithesis.⁹⁰ The concept is so ambiguous that we

⁸² See *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (referring to a regime of "benevolent neutrality").

⁸³ See *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) (declaring that "our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion" (quoting *Walz*, 397 U.S. at 669)).

⁸⁴ See *Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963).

⁸⁵ See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (O'Connor, J.).

⁸⁶ 489 U.S. 1 (1989).

⁸⁷ See *supra* note 53.

⁸⁸ See Justice Souter's discussion of the term "neutrality" in *Mitchell v. Helms*, 120 S. Ct. 2530, 2578-81 (2000) (Souter, J., dissenting) (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8-9 (1993) (evenhanded); *Mueller v. Allen*, 463 U.S. 388, 401 (1983) (same); *Meek v. Pittenger*, 421 U.S. 349, 372 (1975) (secular); *Tilton v. Richardson*, 403 U.S. 672, 677 (1971) (median); *Bd. of Educ. v. Allen*, 392 U.S. 236, 245 (1968) (secular); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (median)).

⁸⁹ Compare *Mitchell*, 120 S. Ct. at 2556-58 (O'Connor, J., concurring in judgment) (arguing that to determine whether aid to a religious organization is constitutional, the Court has considered and should consider other factors besides neutrality, such as whether the organization uses government aid to fund its religious objectives), with *id.* at 2578-82 (Souter, J., dissenting) (discussing the three ways in which the Court has viewed neutrality: first, as a median position between aiding and handicapping religion; second, as a requirement that the state confine itself to secular objectives; and third, as a requirement that the organization provide a nonreligious benefit); see also *infra* note 100 (discussing the views of Justices O'Connor and Souter).

⁹⁰ Compare Esbeck, *supra* note 69 (describing neutrality as "separation's major competitor" for the basis of Supreme Court's Establishment Clause decisions), with Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997) [hereinafter Laycock, *Underlying Unity*] (arguing that separation is not fundamentally different from neutrality); see also Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*,

truly can "agree on the principle of neutrality without having agreed on anything at all."⁹¹

Despite this checkered pedigree, a more coherent notion of neutrality began to emerge from the Court—or at least from its more conservative members—in the mid-1980s.⁹² Many view this version of neutrality—evenhanded treatment of religious entities under generally applicable laws—as the counterpoise to the more separationist nonadvancement position in Establishment Clause jurisprudence.⁹³ Increasingly, these "two bedrock principles" of equal treatment and nonadvancement have been on a collision course, despite their "equal . . . jurisprudential pedigree."⁹⁴ Evenhanded neutrality, though, is on the ascent.

Glenn's version of positive neutrality, adapted from works by professors Stephen Monsma and Carl Esbeck,⁹⁵ is closest to Justice Thomas's plurality opinion in *Mitchell*. There, Justice Thomas declared that, pursuant to the principle of neutrality:

13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243 (1999) (criticizing neutrality theory for its failure to address equality, its potential to limit the expression of religious organizations, and its failure to protect minority religions); Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1 (2000) (arguing that neutrality's emphasis on equal, not special, treatment for religion ignores religion's distinct and inherent importance and threatens religious liberty); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990) [hereinafter Laycock, *Disaggregated Neutrality*] (supporting the Court's use of substantive neutrality in its Establishment Clause doctrine and arguing that it requires government to minimize the impact of its actions on religious decisions); Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146 (1986) (urging that reliance on neutrality is justified in most Establishment Clause cases but that in some cases, such as those involving public schools, departure from strict neutrality is required); Dhananjai Shivakumar, *Neutrality and the Religion Clauses*, 33 HARV. C.R.-C.L. L. REV. 505 (1998) (urging a rejection of formal neutrality in favor of an approach better able to secure religious liberty and equality); Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243 (1996) (arguing that neutrality requires government speech to be non-neutral in the sense that it must avoid an official endorsement of religion); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83 (1986) (arguing against absolute applications of neutrality principle in favor of a more flexible approach that recognizes 'constitutional pluralism').

⁹¹ Laycock, *Disaggregated Neutrality*, *supra* note 90, at 994.

⁹² See *Bowen v. Kendrick*, 487 U.S. 589, 608-09 (1988); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 487-89 (1986); *Mueller*, 463 U.S. at 398-99.

⁹³ Of course, the neutrality theory has had an even greater impact in the Free Exercise context since *Employment Division v. Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause permits the state to prohibit religious use of peyote and to deny employment benefits to a person discharged for such use), a decision generally deplored by both separationists and accommodationists. For a discussion of neutrality's relevance in this context, see *supra* notes 2 and 3 and accompanying text.

⁹⁴ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 847, 849 (1995) (O'Connor, J., concurring).

⁹⁵ See MONSMA, *supra* note 3, at 188-209; Esbeck, *supra* note 69, at 20-38.

if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.⁹⁶

One way to assure that a program is neutral, according to Justice Thomas, is whether it contains the counterweight of "private choice," which determines "what schools [and agencies] ultimately benefit from the governmental aid, and how much."⁹⁷ With these two elements cojoined, Establishment Clause concerns evaporate, even if some public funds are diverted for religious uses.⁹⁸ Although neutrality generally operates as a constitutional principle in situations where legislatures have affirmatively opened benefits programs to religious organizations, it does not mandate their inclusion. One can assume, however, from Justice Thomas's discussion in *Mitchell* that he would agree with Glenn that the exclusion of religious actors under neutral funding programs evinces discrimination against religion.⁹⁹

At first glance, Glenn's version of neutrality appears consistent with that of the *Mitchell* plurality. However, the marriage becomes strained as Glenn takes neutrality in directions the Court's conservative block is unwilling to go.¹⁰⁰ Justice Thomas apparently sees private

⁹⁶ *Mitchell v. Helms*, 120 S. Ct. 2530, 2541 (2000) (Thomas, J., plurality opinion) (citation omitted).

⁹⁷ *Id.* at 2541 (Thomas, J., plurality opinion) ("For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment."). Although Justice Thomas states that private choice "assure[s]" neutrality, *id.* (Thomas, J., plurality opinion), as if choice helps achieve that value, he also states that "private choices help to ensure neutrality," apparently meaning it protects neutrality. *Id.* at 2542 (Thomas, J., plurality opinion) (emphasis added). Whether Justice Thomas intended both meanings is unclear, as they are very different in their description of the effect private choice has on neutrality.

⁹⁸ The *Mitchell* plurality acknowledged that public resources had been diverted for religious purposes in that case. *See id.* at 2547 (Thomas, J., plurality opinion). As the Court noted:

So long as the government aid is not itself "unsuitable for use in the public schools because of religious content," and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern.

Id. (Thomas, J., plurality opinion) (citation omitted).

⁹⁹ *See* GLENN, *supra* note 11, at 69; *see also* Justice Thomas's dissent from denial of certiorari in *Columbia Union Coll. v. Clark*, 527 U.S. 1013, 1014-15 (1999) (characterizing the exclusion of a religious college from a state funding program as evincing "invidious religious discrimination"); *Rosenberger*, 515 U.S. at 836-37 (finding viewpoint discrimination where university funding program denied aid to religious publication).

¹⁰⁰ Even assuming that a convergence of views existed, Justice Thomas's version of neutrality does not command a majority of the current Court. Justices O'Connor and Souter disagreed strongly with Justice Thomas's analysis and his apparent use of neutrality as the sole determinative factor in Establishment Clause cases. *See Mitchell*, 120 S. Ct. at 2557

choice as a crucial, if not necessary, element in the constitutional equation, implying that *direct* grants to religious agencies and schools under a general schema would still be problematic.¹⁰¹ In contrast, Glenn would not require the presence of private choice or a third party payee as under a voucher system, but would allow direct monetary grants to religious agencies that could be used for religious activities. In fact, for Glenn, the entire function of the neutrality principle is to permit funding of agencies and schools that infuse their programs with spirituality.¹⁰² Although Glenn sees advantages to a voucherized system over one involving direct grants, those pluses have nothing to do with bolstering the constitutionality of a program by "breaking the chain" of government advancement of religion;¹⁰³

(O'Connor, J., concurring in judgment) ("[W]e have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid."); *id.* at 2581 (Souter, J., dissenting) (discussing the "insufficiency of evenhandedness [sic] neutrality as a stand-alone criterion of constitutional intent or effect"). Although Justices O'Connor and Souter share a belief in the insufficiency of neutrality as a constitutional axiom, they diverge on how much weight to assign to other considerations, such as the likelihood that government funds will be used for religious purposes. See *supra* note 89.

¹⁰¹ "Of course, we have seen 'special Establishment Clause dangers' when money is given to religious schools or entities directly rather than, as in *Witters* and *Mueller*, indirectly." *Mitchell*, 120 S. Ct. at 2546 (Thomas, J., plurality opinion) (citation omitted); see also *Rosenberger*, 515 U.S. at 842 ("[W]e have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions."); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (describing the state-paid sign language interpreter as providing only an "indirect economic benefit" and that "no funds traceable to the government ever find their way into sectarian schools' coffers"). However, Justice Thomas's understanding of the role of private choice is inconsistent, with him downplaying its significance later in *Mitchell*: "Although the presence of private choice is easier to see when aid literally passes through the hands of individuals—which is why we have mentioned directness in the same breath with private choice—there is no reason why the Establishment Clause requires such a form." 120 S. Ct. at 2545 (Thomas, J., plurality opinion) (citations omitted). This statement, however, precedes the above-quoted qualifying statement about direct money grants.

¹⁰² As Esbeck describes it:

[I]n neutrality theory it makes no difference whether a provider is "pervasively sectarian" or whether the nature of the direct aid is such that it can be diverted to a religious use. Most importantly, the courts no longer need to ensure that governmental funds are used exclusively for "secular, neutral, and nonideological purposes," as opposed to worship or religious instruction. Neutrality theory eliminates the need for the judiciary to engage in such alchemy.

Esbeck, *supra* note 69, at 37 (footnotes omitted). Esbeck also states:

The neutrality principle . . . requires only that the Court examine the outcome of the welfare program with an eye to determining whether the public purpose is being served by the social service provider. If so, then the judicial inquiry is at an end, for the government has received full "secular" value in exchange for taxpayer funds.

Id. at 17 n.68.

¹⁰³ This is not to suggest that the existence of "private choice" renders the benefits flowing from a funding program "indirect" and thus constitutional. See Steven K. Green, *Private School Vouchers and the Confusion Over "Direct" Aid*, 10 GEO. MASON U. CIV. RTS. L.J. 47

rather, vouchers provide greater protection for religious organizations by limiting government regulation and oversight.¹⁰⁴

The Court's view of religion clause neutrality also has a Free Exercise side that Glenn is unwilling to accept. Central to Glenn's view of neutrality is that the Constitution entitles religious entities to participate equally in government funding programs but exempts them from most government regulations that accompany the funding programs. Although charitable choice proponents got their way in the Welfare Reform Act through express language protecting the religious identity of religious providers and exempting them from Title VII,¹⁰⁵ Glenn and his allies believe the Constitution mandates these exclusions. For at least the present, however, the constitutional mandate goes the other direction. Religious organizations and claimants are not exempt from neutral laws of general applicability, even if their application has a disproportionate impact on religious practice.¹⁰⁶ While some courts may view charitable choice's regulatory exemptions as reasonable accommodations designed to avoid government entanglement with religion, others may not because government funding is involved. Regardless of whether such special treatment accommodates or advantages religion, the Free Exercise Clause under the Court's view of neutrality does not require special treatment.¹⁰⁷ This is the downside to neutrality as the operative principle for the religion clauses. Those who advocate neutrality as the be-all and end-all of religion clause jurisprudence have "traded our constitutional birth-right to engage in religious practices free from government interference for the pottage of government subsidies."¹⁰⁸ To be sure, the neutrality principle does not bar all special treatment of religion. Justice Scalia, author of *Employment Division v. Smith* and the Court's leading proponent of neutrality theory, would have allowed the Texas state legislature to exempt religious magazines—and only religious magazines—from state sales taxes as a permissible accommodation of

(1999/2000) (arguing that the Court cannot find vouchers constitutional on the grounds that they are indirect aid).

¹⁰⁴ See GLENN, *supra* note 11, at 112-19.

¹⁰⁵ 42 U.S.C. § 604a(d), (f) (Supp. IV 1998).

¹⁰⁶ See *Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990).

¹⁰⁷ See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987) (upholding expanded Title VII exemption for religious organizations as a permissible accommodation of religion while opining that the exemption was likely not required by the Free Exercise Clause).

¹⁰⁸ Alan Brownstein, *Constitutional Questions About Charitable Choice*, in *WELFARE REFORM AND FAITH-BASED ORGANIZATIONS* 219, 248 (Derek Davis & Barry Hankins eds., 1999) [hereinafter *WELFARE REFORM*]; see also Conkle, *supra* note 90, at 25 ("[T]he immediate impact of formal neutrality may seem beneficial for religion, but its long-term effect, at least in some contexts, may be to contaminate and secularize religion.").

religion.¹⁰⁹ But freedom from regulation via legislative largess provides little security for religious organizations.

In addition to lacking basis in Supreme Court jurisprudence, Glenn's version of positive neutrality suffers from several other defects. Most importantly, Glenn's argument that neutrality mandates religious inclusion in government programs fails to distinguish between those types of funding programs that are designed to provide benefits to a broad class of recipients and those that are tied more intimately to the government's proprietary functions and are designed to advance specific governmental goals.¹¹⁰ In these latter areas, termed "managerial domains" by Robert Post, the government can structure its programs to achieve explicit governmental objectives by excluding particular viewpoints or perspectives without engaging in impermissible discrimination.¹¹¹ For example, the Department of Veterans Affairs could decide—as it apparently has—that medical care is the appropriate course of treatment in its V.A. hospitals and refuse to employ Christian Science practitioners or Native American shamans who undoubtedly offer a different perspective on the treatment of illness.¹¹² Such "discrimination" in a government program is permissible because the government can, "without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."¹¹³ The same principle holds true for the precharitable choice restrictions on funding pervasively sectarian entities or using funds on religious activities. Certainly, it is reasonable for the government to insist on a secular, nonideological approach to publicly funded human services as a way of ensuring that it receives full secular value for its money and that all programs are amenable to the greatest number of beneficiaries. The fact that the government narrows the scope of its program in a manner that excludes a religious approach to social services or education does not mean it has engaged in constitutionally suspect discrimination or has imposed an unconstitutional

¹⁰⁹ See *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 39 (1989) (Scalia, J., dissenting).

¹¹⁰ See GLENN, *supra* note 11, at 76-79, 127-28.

¹¹¹ Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996).

¹¹² Cf. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (noting that merely because the government established the National Endowment for Democracy to "encourage other countries to adopt democratic principles it was not required to fund a program to encourage competing lines of political philosophy such as communism and fascism" (citation omitted)).

¹¹³ *Id.* at 193.

condition on a protected right.¹¹⁴ Rather, the government has merely chosen to provide services in a particular manner.¹¹⁵

Granted, when the government establishes a forum with the express purpose of encouraging a diversity of views from private speakers, the Constitution constrains its ability to choose between proffered perspectives.¹¹⁶ But even the *Rosenberger* Court acknowledged that this nondiscrimination principle has scant application outside the context of a free speech forum,¹¹⁷ a point reiterated in *National Endowment for the Arts v. Finley*.¹¹⁸ Glenn confuses such speech-enhancing funding programs with those designed by the government to achieve specific goals or with those in which enhancing speech is a by-product.¹¹⁹

In such managerial domains, "speech is necessarily and routinely constrained on the basis of both its content and its viewpoint."¹²⁰ This is true even where the government enlists private entities to administer those programs or "convey its own message."¹²¹ As the Court noted in *Rosenberger*, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legit-

¹¹⁴ See Carl H. Esbeck, *The Neutral Treatment of Religion*, in WELFARE REFORM, *supra* note 108, at 173, 177 ("[T]he exclusion of certain religious providers based on what they believe and because of how they practice and express what they believe, is discrimination on the bases of religious exercise and religious speech.").

¹¹⁵ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *Rust*, 500 U.S. at 193-94.

¹¹⁶ See *Rosenberger*, 515 U.S. at 834.

¹¹⁷ See *id.* at 833. The Court noted:

We recognized [in *Rust v. Sullivan*] that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

Id. (citation omitted).

¹¹⁸ 524 U.S. 569, 586-88 (1998). Justices Scalia and Thomas were even firmer on this point:

It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects. . . . And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their (and, in our democracy, our) favored point of view by achieving it directly . . . or by giving money to others who achieve or advocate it. . . . None of this has anything to do with abridging anyone's speech.

Id. at 598 (Scalia, J., concurring in the judgment).

¹¹⁹ See GLENN, *supra* note 11, at 98 (arguing for the inclusion of religious entities in funding programs on the authority of *Rosenberger*). However, *Rosenberger* recognizes the distinction between government programs that use private speakers to achieve specific goals and programs established for the purpose of encouraging "a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 833-34 (affirming holding in *Rust* by stating: "There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program.").

¹²⁰ Post, *supra* note 111, at 166.

¹²¹ *Rosenberger*, 515 U.S. at 833.

imate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."¹²²

This first point highlights a second problem with Glenn's neutrality argument. Like many charitable choice proponents, Glenn loses sight of the true beneficiary under PRWORA. The purpose of the Temporary Assistance for Needy Families (TANF) program and other social service measures is not to enhance the speech or agenda of the agency providing the services. Rather, the purpose is to assist and empower welfare recipients.¹²³ This again is why a *Rosenberger* model is inapposite for such funding schemes. In that case, the funding was intended to enhance the speech of the same individuals who received the funds, whereas under charitable choice, the religious agencies serve as intermediaries.¹²⁴ Although the government cannot discriminate against recipients on the basis of their religious perspectives and affiliations when it comes to providing services, it can choose the message it wishes to accompany its programs, even if it uses private contractors and grantees.¹²⁵

Third, one cannot accurately characterize Glenn's version of neutrality, with its numerous exemptions for religious organizations from government regulations and oversight, as an even-handed approach. Setting aside for the moment PRWORA's authorization of employment discrimination in publicly funded positions—an exemption not afforded secular providers—one can hardly consider charitable choice to treat religious and secular providers alike. Only with religious providers is the government prohibited from controlling the message of its grantees.¹²⁶ For Glenn, this provision is crucial for ensuring that the faith-based organizations maintain their identity and integrity. He makes a strong case for how government bureaucracy and oversight gradually undermine an organization's mission and effectiveness.¹²⁷

¹²² *Id.*; see also *Finley*, 524 U.S. at 587-88 (affirming the government's ability to fund a program in the manner of its choice). Glenn discusses the various types of funding arrangements available to religious providers—contracts, vouchers, grants, subsidies, franchises—but is primarily concerned with how much regulation accompanies the various arrangements and how that affects the autonomy of the faith-based entities. His discussion does not acknowledge that a particular funding arrangement may determine whether the provider is acting independently or as a government agent or surrogate. See GLENN, *supra* note 11, at 99-130.

¹²³ See Brownstein, *supra* note 108, at 251-52.

¹²⁴ See *Rosenberger*, 515 U.S. at 840; see also *Finley*, 524 U.S. 573-74 (describing funding through the National Endowment for the Arts).

¹²⁵ See *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (noting that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.").

¹²⁶ See 42 U.S.C. § 604a(b) (Supp. IV 1998).

¹²⁷ See GLENN, *supra* note 11, at 99-104.

The recurring theme in *Ambiguous Embrace* is that “[p]rotecting the ability of faith-based agencies and schools to be *unlike* those operated by government is essential both to their own integrity and also to the contribution that they can make to a diverse society.”¹²⁸ However, if Glenn is correct, this special treatment of religious entities cannot be justified on grounds of neutrality. While special treatment may minimize the government’s influence on religious entities,¹²⁹ it has the additional effect of skewing the marketplace of ideas in favor of religion. In so doing, it contravenes a central tenet of neutrality theory: government actions should not influence private religious choices.¹³⁰ As the legislative record indicates, charitable choice is not merely about allowing religious agencies to participate equally in government-funded social services; rather, it is based on the premise that a faith-based approach is both superior to and more effective than the “worn out” secular approach.¹³¹

Consequently, charitable choice requires the government to remain hands-off in its treatment of faith-based providers, allowing them to communicate their religious message unfettered. On one level, this unequal treatment creates the impression that religious and moral solutions to human problems are superior and preferable. Yet setting aside concerns of government imprimatur, these exemptions provide a powerful advantage to religious providers not afforded to secular providers, resulting in the very type of viewpoint discrimination Glenn disdains. Only religious providers are free to communicate their ideological message to welfare recipients and seek to influence their religious choices.¹³² Additionally, “[f]reedom from regulatory burdens empowers institutions”:¹³³

It reduces their costs, and increases their ability to exercise control over their members, attract new adherents, fulfill their normative mission and, perhaps most importantly, maintain their sense of continuous and distinct identity. The ability to engage in conduct that satisfies moral requirements and to perform rituals that demonstrate allegiance to a belief system or deity without state interference

¹²⁸ *Id.* at 104.

¹²⁹ See Laycock, *Disaggregated Neutrality*, *supra* note 90, at 1002 (“Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized.”).

¹³⁰ Esbeck suggests that the goal of neutrality is “to minimize the effects of governmental action on individual or group choices concerning religious belief and practice.” Esbeck, *supra* note 69, at 4; see also Laycock, *Underlying Unity*, *supra* note 90, at 69-70 (describing Esbeck’s views).

¹³¹ See Minow, *supra* note 10, at 529-30; Julie A. Segal, A “Holy Mistaken Zeal”: The Legislative History and Future of Charitable Choice, in WELFARE REFORM, *supra* note 108, at 9, 9-27.

¹³² For a fuller discussion of this problem, see Brownstein, *supra* note 108, at 240-45; Brownstein, *supra* note 90, at 246-47.

¹³³ Brownstein, *supra* note 90, at 271.

reinforces viewpoints and demonstrates their force and authority. These rights have substantial utility for speakers in competition with conflicting viewpoints.¹³⁴

But most important for the purpose of neutrality theory, charitable choice authorizes faith-based providers to influence the religious choices and behavior of recipients through a government funded program. Few actions could be more inconsistent with neutrality toward religion.¹³⁵

Finally, Glenn's version of neutrality is incomplete as a constitutional doctrine. It fails to account for other important First Amendment values that inform the religion clauses. Neutrality theory seeks to eliminate government constraints on religious liberty.¹³⁶ Although protecting religious liberty is central to the religion clauses, other values such as ensuring religious (and secular) equality, alleviating religious dissension, and protecting the legitimacy and integrity of both government and religion are equally important.¹³⁷ A reference to history is instructive. James Madison, arguably the father of the First Amendment, distinguished his support for religious liberty from his concern for the deleterious effects that religious majorities had on both civil liberties and government.¹³⁸ Simply put, Madison believed that impeding majoritarian impulses would enhance religious equality in ways that extended beyond merely protecting the liberty interests of religious minorities.¹³⁹ In his *Memorial and Remonstrance*, Madison

¹³⁴ *Id.* at 271-74.

¹³⁵ See Laycock, *Underlying Unity*, *supra* note 90, at 69-71.

¹³⁶ See GLENN, *supra* note 11, at 77-79; MONSMA, *supra* note 3, at 188-89; Esbeck, *supra* note 69, at 4-5.

¹³⁷ See Brownstein, *supra* note 90, at 256-67 ("Equality and freedom of speech interests are simply too essential a part of the constitutional framework relating to religion to be dismissed as irrelevant or secondary."); Ira C. Lupu, *To Control Faction and Protest Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 360 (1996) (discussing the Religion Clauses' "other animating concerns—to protect religious equality and to control religious factionalism"); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197-99 (1992).

¹³⁸ *Federalist 51* states this concern most clearly:

In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects. . . .

THE FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

¹³⁹ In a letter to Thomas Jefferson during the fight over ratification of the Constitution, Madison warned that:

[i]n our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 562, 564 (James Morton Smith ed., 1995). This statement follows immediately on an ex-

identified the value of a society based on "equal conditions," with people retaining "equal title to the free exercise of Religion according to the dictates of Conscience."¹⁴⁰ Speaking to those who would promote religious liberty as the sole value, Madison countered that "[w]hilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."¹⁴¹ Madison also viewed the religion clauses as ensuring the integrity of both government and religion, writing that religious establishments produce a "spiritual tyranny on the ruins of the Civil authority," while they undermine the "purity and efficacy of Religion."¹⁴²

A focus on neutrality, however, discounts these values of equality and government integrity. For example, Glenn's view of neutrality, with its numerous exemptions for faith-based organizations, empowers such groups to influence the religious choices of religious and secular minorities and distorts the marketplace of ideas by advantaging one ideological viewpoint.¹⁴³ His requirement that government affirmatively fashion its programs in ways that not only remove regulatory burdens on faith-based groups, but also facilitate their viewpoints (as arguably occurs under charitable choice), will result in the government's alignment with the religious approach to social services. In the end, it will undermine the very appearance of government neutrality toward religion that Glenn advocates.

III

THE JUSTIFICATION FOR VOUCHERS AND CHARITABLE CHOICE

Despite Glenn's promotion of positive neutrality as the legal justification for vouchers and charitable choice, *Ambiguous Embrace* is less of a legal treatise and more of a jeremiad about the benefits and dangers of such programs. As a result, his argument for vouchers and

tended discussion about the need for a bill of rights to prevent religious tests and establishments. *See id.*

¹⁴⁰ James Madison, To the Honorable General Assembly of the Commonwealth of Virginia a Memorial and Remonstrance (1785), reprinted in JAMES MADISON ON RELIGIOUS LIBERTY 55, 57, ¶ 4 (Robert S. Alley ed., 1985) [hereinafter RELIGIOUS LIBERTY].

¹⁴¹ *Id.* The theme of religious equality as distinct from religious liberty runs throughout the Memorial. *See id.* at 56, ¶ 1 (expressing concern that "the majority may trespass on the rights of the minority"); *id.* at 58, ¶ 8 (declaring that a "just [g]overnment" must protect "every [c]itizen in the enjoyment of his Religion with the same equal hand"); *id.* at 59, ¶ 15 (reaffirming "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience").

¹⁴² *Id.* at 58, ¶¶ 7, 8; *see also* JAMES MADISON, DETACHED MEMORANDA, reprinted in RELIGIOUS LIBERTY, *supra* note 140, at 89, 90 (describing the constitutional "separation between Religion & Govt" as "[s]trongly guard[ing] . . . [against] the danger of encroachment by Ecclesiastical Bodies").

¹⁴³ *See* Brownstein, *supra* note 90, at 268-78.

charitable choice varies from most earlier works that have relied on market approaches, empowerment theories, or claims of program effectiveness. Not that the book is above bashing teachers' unions or touting the success rates of parochial education and faith-based programs like Teen Challenge.¹⁴⁴ Rather, Glenn's justification for vouchers and charitable choice rests on faith-based organizations' unique contribution to human services and the moral superiority of their programs over comparable services provided by government agencies and schools.

According to Glenn, the unique ability of faith-based organizations to generate and perpetuate a sense of moral obligation essential for human service programs justifies vouchers and charitable choice. Government schools and social service programs are unable to offer more than an amoral and insensitive approach due to their commitment to professional standards and a system that emphasizes formalism and routinization over substantive goals. In Glenn's view, most government standards and regulations "have more to do with staffing, training, accreditation, and salary levels than they do with how children [and the needy] are treated and to what ends."¹⁴⁵ As a result of this misplaced emphasis on professionalism and standardization, public schools and social service agencies have become ineffective and unable to change.¹⁴⁶ Teachers no longer possess a sense of mission that reaches down to their students and social workers "no longer understand themselves as uplifting humanity, but as attempting—with scant success—to patch up the victims of an unjust social order."¹⁴⁷ According to Glenn, only faith-based agencies can provide the ability and commitment to instill a "moral judgment" that "carries with it an expectation that a person not only should but *can* change."¹⁴⁸

Glenn's justification for vouchers and charitable choice therefore has little to do with improving education generally or empowering low-income parents to take advantage of educational choices—not that Glenn would be opposed to these goals—or even providing welfare recipients the opportunity to receive services in a manner that conforms to their religious beliefs. Rather, faith-based institutions supply a necessary ingredient to civil society, and government-funded

¹⁴⁴ See GLENN, *supra* note 11, at 62-73, 175.

¹⁴⁵ *Id.* at 171.

¹⁴⁶ See *id.* at 174 ("The public school itself is no longer seen as the high temple of democracy and of Americanism (except, in suitably secularized form, in the rhetoric of the teacher unions), but as a troubled and often ineffective institution on a par with public housing.").

¹⁴⁷ *Id.* at 175.

¹⁴⁸ *Id.* at 179 "There has been a congruence and mutual reinforcement between this stance of amorality—understanding behavior as 'functional' or 'dysfunctional' rather than right or wrong—and the bureaucratic impersonality, emptied of all normative themes, characteristic of government provided services." *Id.*

vouchers and charitable choice will permit individuals to take advantage of religious approaches. Once again, however, Glenn makes too good a case for faith-based alternatives. If government schools and agencies are so ineffective and mired in bureaucratic standards, then vouchers and charitable choice alone are insufficient to address the problem. Perhaps this is why *Ambiguous Embrace* points to the cooperative arrangements in some European countries where private institutions provide the bulk of human services. However, Glenn's reliance on the European arrangements is incomplete, for he fails to discuss adequately how the United States can apply those models in light of the historical and cultural differences between the American and European systems.¹⁴⁹ Because it is unlikely that the United States will adopt such arrangements, Glenn sees vouchers and charitable choice as a way for parents and beneficiaries to take advantage of faith-based approaches to human services while laying the foundation for more whole-scale change.¹⁵⁰

Glenn's argument for vouchers breaks the mold in other ways. Most refreshing are his criticisms of market theories. Glenn urges that market-based theories are equally incapable of generating the sense of moral obligation necessary in human services.¹⁵¹ In addition, Glenn argues that "information available about the quality of services is inevitably imperfect and those who receive publicly funded services are often poor and characteristically inexperienced at making decisions about such complex matters."¹⁵² Glenn also disputes arguments that vouchers and charitable choice will save public resources. Such "cost reducing" rationales take advantage of faith-based organizations and rest on speculative projections of long-term savings based on immediate gains.¹⁵³ None of these rationales justifies the adoption of vouchers or charitable choice.

In the end, Glenn's argument does not rely on equal treatment or empowerment theories; nor does it depend on the purported effectiveness of privately run educational and social service programs compared to their publicly run counterparts. Rather, Glenn's argument for vouchers and charitable choice rests on the special character of faith-based human services and on the unique value-shaping role they perform in civil society.

¹⁴⁹ See *id.* at 110-11, 120-22, 131-64. Glenn also acknowledges that the European models provide "privileged position" to more established religions, but does not explore the equal protection and free speech implications of such a model in America. *Id.* at 134-35.

¹⁵⁰ See *id.* at 271-73.

¹⁵¹ See *id.* at 25.

¹⁵² *Id.* at 112.

¹⁵³ *Id.* at 267; see also SMITH & LIPSKY, *supra* note 7, at 193-97 (arguing that market competition in public services will not necessarily prove cost-effective in the long run).

IV

THE THREAT TO INTEGRITY

Nonlawyers may view the discussion of how government funding and regulation undermines the integrity and mission of faith-based organizations as the most important part of the book. Indeed, Glenn's consideration of the pressures facing religious organizations that receive government grants, contracts, and vouchers is the book's most valuable contribution to the ongoing debate about vouchers and charitable choice.¹⁵⁴ For Glenn and other advocates of vouchers and charitable choice, faith-based organizations must be able to maintain their distinctiveness or else they will lose their purpose and effectiveness.¹⁵⁵ As this Review has discussed, his vision of neutrality allows religious organizations to receive public funding but remain exempt from most oversight and regulation that threatens the integrity of their mission. However, Glenn wisely acknowledges that mere freedom from regulation provides little protection from the myriad forces that bombard private organizations when they participate in the public sector. Pressure to professionalize staffs and adapt programming goals to meet societal expectations and available funding, a growing dependence on public funding with the incremental compromises it encourages, and a "voluntary abandonment of . . . original purpose" or "loss of nerve" are the leading hazards facing faith-based organizations.¹⁵⁶ Government regulation, which often attaches irrespective of funding, represents a lesser threat to an organization's integrity.¹⁵⁷

One type of regulation remains of utmost concern, however, and Glenn devotes an entire chapter to discussing why faith-based organizations should be able to hire coreligionists to provide educational and social services, regardless of whether those positions are publicly funded.¹⁵⁸ For Glenn, there is "probably no aspect of a faith-based organization's operation that is as important to the continued integrity of its mission as decisions made about hiring staff and disciplining or firing staff who turn out not to support the distinctive character of

¹⁵⁴ Participation of religious organizations in government funding programs raises a host of legal and policy issues beyond those associated with the Establishment Clause. See Carl H. Esbeck, *Government Regulation of Religiously Based Social Services: The First Amendment Considerations*, 19 HASTINGS CONST. L.Q. 343 (1992) (discussing First Amendment implications of religious organization participation in government-funded programs); Dean M. Kelley, *Religious Access to Public Programs and Government Funding*, 8 BYU J. PUB. L. 417 (1994) (discussing the long-term negative effect of government contracts for services with religious organizations); Melissa Rogers, *The Wrong Way to Do Right: Charitable Choice and Churches*, in WELFARE REFORM, *supra* note 108, at 61-88 (discussing the negative impact of a church-state partnership upon pervasively sectarian entities).

¹⁵⁵ See GLENN, *supra* note 11, at 103-04, 247-51, 290.

¹⁵⁶ *Id.* at 241.

¹⁵⁷ See *id.* at 42-61, 165.

¹⁵⁸ See *id.* at 193-211.

the organization.”¹⁵⁹ Section 702 of Title VII already exempts religious organizations and educational institutions from prohibitions on religious discrimination, while language in charitable choice explicitly allows religious grantees to discriminate on religious grounds in the employment of publicly funded positions.¹⁶⁰ Despite these provisions, the issue of religious discrimination is hardly a closed book. Although the Supreme Court upheld section 702 as a permissible accommodation of religion, it did not find that the Free Exercise Clause mandated the exemption for nonreligious positions.¹⁶¹ Moreover, although nothing in the law suggests that Title VII’s exemption does not apply to religious organizations simply because they receive public funding such as Medicare,¹⁶² Glenn knows that the constitutionality of the exemption as it applies to *publicly funded positions* remains an open question.¹⁶³ Hence, Glenn intends the discussion of employment discrimination to shore up the rather shaky basis for discrimination in funded programs.

On one level, the ability of faith-based schools and social service programs to hire only coreligionists ensures that their religious mission will not be hampered, nor their message garbled, by employing disbelievers in programmatic positions. It guarantees the integrity of the spiritual approach.¹⁶⁴ The blanket exemption covering all employees—including those engaged in ministerial or programmatic functions and those in clerical or support roles—also prevents government oversight and interference in the hiring process.¹⁶⁵

These are all important considerations for Glenn; yet, the need to discriminate goes much deeper. The ability to employ coreligionists ensures the freedom of religious schools and agencies “to express a

¹⁵⁹ *Id.* at 197.

¹⁶⁰ See 42 U.S.C. § 2000e-1 (1994); 42 U.S.C. § 604a(f) (Supp. IV 1998); 42 U.S.C.A. § 9920(b)(3) (West Supp. 2000).

¹⁶¹ See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987) (noting that the Free Exercise Clause probably “required no more” of Title VII than an exemption for religious activities).

¹⁶² *Young v. Shawnee Mission Med. Ctr.*, No. 88-2321-S, 1988 U.S. Dist. LEXIS 12248, at *5 (D. Kan. Oct. 21, 1988) (finding that a religious organization’s acceptance of Medicare funding on behalf of some patients does not transform the organization into a publicly funded institution).

¹⁶³ See *Dodge v. Salvation Army*, No. S88-0353, 1989 WL 53857 (S.D. Miss. Jan. 9, 1989) (holding unconstitutional section 702 as it applied to an employee in a publicly funded position). Finally, state and local jurisdictions often attach their own restrictions on private contractors and grantees, including religiously affiliated agencies. See GLENN, *supra* note 11, at 109.

¹⁶⁴ See GLENN, *supra* note 11, at 196-97, 201, 205. Glenn believes this ability to discriminate is crucial, quoting Stephen Monsma for the proposition that “[i]f the teachers or other staff of a nonprofit agency cannot be hired on the basis of their faith commitments, the religious character of that nonprofit would be destroyed.” *Id.* at 196 (quoting MONSMA, *supra* note 12, at 126).

¹⁶⁵ See *id.* at 199; *Amos*, 483 U.S. at 336.

distinctive ethos and character" and of their teachers and social workers to teach and minister "in a way consistent with that ethos and character."¹⁶⁶ In essence, the exemption protects the "collective freedom" of all employees to further that shared ethos, thereby preserving a form of collective "academic freedom" not enjoyed by government teachers and social workers.¹⁶⁷ For Glenn, the "moral coherence that they derive from a shared ethos" is a primary strength of faith-based institutions.¹⁶⁸ Thus correctly understood, the ability to employ only coreligionists is not an issue of discrimination but one of *freedom*, of the right of teachers and social workers to work in an institution where there is a shared vision of human service. By emphasizing the collective freedom guaranteed by the Title VII exemption, Glenn seeks to turn the issue of discrimination on its head.¹⁶⁹ However, the unintended consequence of shifting the focus to preserving the shared religious vision of faith-based organizations is that it highlights the Establishment Clause concern that allowing discrimination in publicly funded positions furthers the religious mission of the organizations.

Missing from Glenn's discussion is a consideration of whether the ability to employ coreligionists should turn on the type of funding program—contract, grant, or voucher—or on whether a faith-based organization is assuming the roles of government actors, such as deciding eligibility for benefits.¹⁷⁰ Arguments supporting discrimination might also be more compelling depending on the type of position (e.g., substance abuse counselor versus custodian; religious studies teacher versus cafeteria worker). This would have been a useful discussion, but one can appreciate Glenn's hesitation to distinguish between funding mechanisms or positions, thereby excluding certain programs and relationships from the protection of section 702. Of additional concern for Glenn is that Title VII still prohibits religious organizations from discriminating on nonreligious grounds, such as race and gender.¹⁷¹ As a result, he argues that courts should treat

¹⁶⁶ GLENN, *supra* note 11, at 198.

¹⁶⁷ *Id.* at 198-99. "It is therefore possible to speak of the *collective* freedom of teaching . . . that supports the freedom of teachers *to the extent that they work in a school that corresponds to their own convictions about education.*" *Id.* at 198 (internal quotation omitted).

¹⁶⁸ *Id.* at 199.

¹⁶⁹ *See id.* at 196-206.

¹⁷⁰ Because the application of Title VII, unlike Title VI, does not turn on the existence of government funding, rules governing state action do not necessarily apply.

¹⁷¹ *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) ("While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin." (citations omitted)); *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1277 (9th Cir. 1982) ("Every court that has considered Title VII's applicability to religious employers

religious school teachers and social service workers in faith-based agencies as the equivalent of clergy, because they too interpret doctrine and represent the mission of the organization. Therefore, they too should fall under the judicially recognized "ministerial exception" to Title VII that forbids all inquiry into the motivation for employment decisions affecting clergy.¹⁷² As of yet, the ministerial exception has not been applied so broadly.¹⁷³ However, under Glenn's proposed interpretation, religious schools and social service agencies could not only insist that teachers and social workers be coreligionists, but also that they be of a particular race, gender, or national origin. The importance of maintaining the distinctive character of the faith-based organization's mission would prevail over the public interest in eradicating discrimination.

Finally, Glenn's discussion of employment decision making also fails to consider how the privilege to discriminate fits with notions of neutrality. To be sure, Glenn's view of positive neutrality exempts religious organizations from those regulations that threaten their religious identity and mission. Nevertheless, while this view accounts for religious autonomy concerns, it does not consider the distinct advantage the ability to discriminate affords religious organizations. On one level, the ability to hire only coreligionists provides an economic advantage over secular charitable organizations, making the former more competitive in obtaining grants. Employing only coreligionists also impacts neutrality by affecting the religious choices of beneficiaries. Enhancing the ability of faith-based organizations to communicate their religious goals will inevitably limit the religious choices of

has concluded that Congress intended to prohibit religious organizations from discriminating among their employees on the basis of race, sex, or national origin.").

¹⁷² See GLENN, *supra* note 11, at 197-98; see also *Combs v. Cent. Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 351 (5th Cir. 1999) (holding that the Free Exercise Clause barred a female clergy member's Title VII employment discrimination suit against a church); *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184, 186 (7th Cir. 1994) (holding the same with respect to a suit brought by an African-American female clergy member); *Rayburn*, 772 F.2d at 1169 (holding the same with respect to a sex and racial discrimination suit); *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972) (holding the same with respect to a sex discrimination suit).

¹⁷³ See *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1040 (8th Cir. 1994) (rejecting ministerial exception for administrative position in synagogue); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 284-85 (5th Cir. 1981) (upholding exception for seminary professors but rejecting it for administrative and support staff). But see *Starkman v. Evans*, 198 F.3d 173, 177 (5th Cir. 1999) (upholding exception for nonordained choir director), *cert. denied*, No. 99-1827, 2000 WL 655917 (U.S. Oct. 2, 2000); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 465 (D.C. Cir. 1996) (upholding exception for nun denied tenure in department of Canon Law). The court stated in *Catholic University*: "The ministerial exception has not been limited to members of the clergy. It has also been applied to lay employees of religious institutions whose 'primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual or worship.'" *Id.* at 461 (quoting *Rayburn*, 772 F.2d at 1169).

those seeking the services. So while exemptions minimize interference with the religious choices of faith-based organizations, they maximize such interference with beneficiaries. Such unequal treatment cannot be justified under a rubric of neutrality.

CONCLUSION

Ambiguous Embrace is an important addition to the growing body of literature about the inclusion of faith-based organizations and schools in government human service programs. Its most significant contribution to the debate is its consideration of the myriad dangers facing faith-based organizations when they decide to participate in government-funded programs. In particular, *Ambiguous Embrace* highlights the difficulties faced by faith-based organizations in maintaining their integrity and sense of mission in light of pressures toward professionalization and standardization.

Unfortunately, the book's shortcomings tend to overshadow these valuable insights. Glenn fails to fully develop his arguments for privatization and the adoption of positive neutrality as the operative standard for Establishment Clause adjudication. This is not to suggest that these arguments are not worthy of discussion. On the contrary, *Ambiguous Embrace* raises important questions about the overlapping roles of public and private spheres and the extent to which government programs should be receptive to religious alternatives. The shortcomings rest in the book's failure to fully explore the implications of the arguments it raises, such as the restricted role of the government in education and social services and the unequal effect of a jurisprudence based on positive neutrality.